IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 134 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BABULAL D DAVE

Versus

KIRTILAL BABULAL

Appearance:

MR PC KAVINA for Appellant

None present for Respondent

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 22/07/98

ORAL JUDGEMENT

1. This appeal is filed by the defendant-tenant under section 100 of C.P.C., 1908 against the judgment and decree of District Judge, Amreli, in Regular Appeal No.46/78 decided on 21-2-1981 under which the judgment and decree of the civil Judge (J.D.) dated 6-5-1978 in Regular Civil Suit No.65/77 has been confirmed.

2. The trial court under its judgment and decree

dated 6-5-1978 decreed the aforesaid suit and the defendant-appellant was ordered to hand over the vacant and peaceful possession of the suit premises on or before 31-7-1978 and also to pay Rs.104/- as rent and mesne profit upto the date of the suit. It is further ordered that the defendant-appellant shall pay Rs.6-50ps. p.m. as mesne profit from the date of the suit till the date of handing over the possession of the suit premises to the plaintiff. The plaintiff has also been awarded the costs of the suit.

3. The facts of the case are that the plaintiff through its power of attorney holder filed the civil suit in the Court of Civil Judge (J.D.) at Amreli to recover the vacant possession of the suit premises, details of which has been given in para-6 of the plaint and also to recover Rs.182/- as arrears of rent. The plaintiff is the owner of the suit premises of which the defendant-appellant is tenant from 1-11-1959. The rent of Rs.6-50ps. was payable month to month in advance and rent note was executed on 27-11-1959 which was for the period of 11 months. After expiry of the period of rent note, the defendant appellant was to hand over the vacant possession of the suit premises. However, after expiry of the said period, what the plaintiff-respondent submitted that the status of the defendant-appellant has become that of a statutory tenant. The defendant-appellant made default in payment of rent and on 24-12-1976 he was in arrears of Rs.91/-. As he was in arrears of rent for more than six months, the plaintiff respondent sent a notice determining the lease of the defendant-appellant. This notice has been served on 3-1-1977 but thereafter within the period as available to the defendant-appellant neither he tendered or paid the arrears of rent nor he vacated the premises. Hence, the suit for recovery of possession and arrears of rent. After service of the summons, the defendant-appellant filed written statement Ex.11 and he has denied the suit of the plaintiff in toto. One of the defences has been taken that the suit notice is not legal and the tenancy has not rightly been terminated in accordance with law. The defendant-appellant averred in the written statement that he is ready and willing to pay the standard rent and he had gone to the plaintiff to make the payment of rent but the plaintiff refused to accept the same. So he tendered the rent by M.O. but that has also been refused and no cause of action has arisen to the plaintiff to file the suit.

4. On the basis of the pleadings of the parties, learned trial court framed as many as 7 issues in the

suit at Ex.12 on 19-10-1977. Issue No.1 relates to the rent note. Issue No.2 relates to the default in payment of rent for more than six months made by the defendant-appellant. Issue No.3 relates to the character of the defendant as statutory tenant. Issue No.4 relates to the validity of notice of determination of the tenancy of the defendant-appellant. Issue No.5 relates to the question - whether the plaintiff-respondent shows he is entitled to vacant possession of the suit premises under sec.12 (3) (a) of the Bombay Rent Act. Issue No.6 relates to - whether the plaintiff-respondent is entitled for vacant possession under any provisions of Bombay Rent Act and issue No.7 is that what decree should be pass in the suit.

5. The trial court decided issues No.1, 2, 3, 4 and 6 in favour of the plaintiff-respondent. Under issue No.5, the court has recorded the finding that the plaintiff-respondent is not entitled to possession under section 12 (3) (a) of the Rent Act.

6. The decree has been passed, as stated in the opening para of the judgment, in favour of the plaintiff-respondent. The defendant-appellant preferred an appeal before the Court of District Judge, Amreli but on 21-2-1981 that appeal was dismissed. However, the defendant-appellant has been granted time to vacate the premises till 16-4-1981. Hence, this second appel before this Court by the defendant-appellant.

7. This appeal was admitted by this Court and this Court framed two substantial questions of law as involved in the appeal, which are as follows.

1. Whether a notice sent not at the suit premises to a tenant is a valid notice.

2. Whether service on the daughter of the defendant at `Savarkundla' is proper service to him for the house of Amreli.

8. Shri P.C. Kavina, learned counsel for the defendant-appellant contended that the notice determining the tenancy in this case was not a valid notice for the reason that it was served upon the daughter of the defendant-appellant at Savarkundla whereas the tenanted premises is situated at Amreli.

9. Nobody put appearance on behalf of the respondent.

10. I have given my thoughtful consideration to the contention made by the learned counsel for the appellant.

11. To appreciate the ground raised and substantial questions of law framed by this Court, I consider it to be appropriate to have a brief glance on the relevant provision of section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

12. Section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of the Act. Sub-section (2) of section 12 lays down that no suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of this standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in section 106 of the Transfer of Property Act, 1882. For the purpose of this second appeal, only the aforesaid provision of section 12 are relevant. Subsection (2) of section 12 clearly provides that the notice has to be served upon the tenant for eviction from the suit premises on the ground of non-payment of rent in the manner as provided under section 106 of the Transfer of Property Act, 1882.

13. Section 106 of the Transfer of Property Act, 1882 provides that every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family member or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

14. The requirements of a valid notice as provided under section 106 of the Act, 1882 are that (i) the notice must be in writing, (ii) it should be signed by or on behalf of the person giving it, and (iii) either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family member or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the

property.

15. Only dispute raised by the defendant-appellant in this appeal is that the notice was delivered to the plaintiff's daughter at Savarkundla i.e. not at the suit premises and as such it is not a valid notice. Admittedly, in the present case, the notice as provided under subsection (2) of section 12 of the Act, 1947 has been sent by registered post at the Savarkundla address of the defendant-appellant. It was addressed to the defendant-appellant and is signed by the advocate of the plaintiff-respondent. This notice has to be given as per the provisions as contained in section 106 of the Act, 1882. As per the provisions of section 106 of the T.P. Act, 1882 the notice in case is delivered to one of the family members of the tenant at his residence then it is a valid service. Learned counsel for the appellant does not dispute that the daughter to whom this notice was delivered by the postal authorities was a major unmarried daughter. Being major unmarried daughter she was a member of the defendant-appellant. So this requirement of section 106 of the Act, 1882 has been fulfilled in this case and as such on the ground that this notice was delivered to the daughter of the defendant-appellant it cannot be held to be a invalid notice.

16. As noticed earlier section 106 of the Act, 1882 requires that this notice has to be served or delivered to the tenant or to one of his family members or servant at his residence. In section 106 of the Act, 1882 a distinction has been made out where the notice under that section has to be served or delivered to the tenant or one of his family members and in a case where the tender or delivery is not practicable, it is to be affixed to a conspicuous part of the property. So two words have been used i.e. "residence" in the case of delivery of service of notice, and "property" in the case of affixing of the notice to conspicuous part of the property.

17. The contention of the learned counsel for the appellant that the notice has to be delivered on the premises means that the rented premises which are situated at Amreli and the notice has been served at Savarkundla is invalid. To deal with this contention of the learned counsel for the appellant, I may consider it to be appropriate to refer here the facts which are undisputed that the defendant-respondent was residing at Savarkundla with his family as he was serving there. It is also not in dispute that the tenanted premises are situated at Amreli. So the defendant-appellant was residing at Savarkundla because of his service and the

purpose, object and meaning of the word "residence" has now to be considered. The word "residence" has not been defined either under the Act, 1947 or under the Act, 1882. In the Act, 1947, the word "premises" (applicable to the State of Gujarat) has been defined, which means any land not being used for agricultural purposes, any building or a part of a building let separately (other than a farm building) including - the garden, grounds, garages and out-houses, if any, appurtenant to such building or part of a building, any furniture supplied by the landlord for use in such building or part of a building, any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof, but does not include a room or other accommodation in a hotel or lodging house. Section 12 of the Act, 1947, uses the word "premises" and not the "residence". As this word "residence" has not been defined under both these Acts, I have to take the dictionary meaning thereof for the purpose of understanding its meaning as well as to decide this contention raised in this appeal.

Black's Law Dictionary 6th Edition, says residence :

Place where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; house where one's home is; a dwelling house. Perez vs. Health and Social Services, 91 N.M.334, 573 P.2d 689, 692. Personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently. T.P. Laboratories, Inc. v. Huge, D.C. Md., 197 F. Supp. 860,865.

Residence implies something more than mere physical presence and something less than domicile. Petition of Castrinakis, D.C. Md., 179 F. Supp. 444, 445. The terms "resident" and "residence" have no precise legal meaning; sometimes they mean domicile plus physical presence; sometimes they mean domicile; and sometimes they mean something less than domicile. Willenbrock v. Rogers, C.A.Pa. 255 F.2d 236, 237. See also Abode; Domicile; Legal residence; Principal residence.

New Websters Dictionary, Vol. II says "residence";

the act or fact of living in a particular place for a considerable length of time | the period during

which one lives at a place | the act or fact of residing | the place where one lives esp. the official house of a dignitary or a dwelling house of some size or pretension in residence living in a place where one fulfills certain duties, e.g. at a hospital inhabiting an official residence.

Random's House Dictionary of English language - "residence"

place, esp. the house in which a person lives or resides; dwelling place; home; the act or fact of residing, the act of living or staying in a specified place while performing official duties, the time during which a person resides in a place.

In Legal and Commercial Dictionary by Shambudas Mitra, first edition, "residence" relying on some of the decisions reported of the courts of England and High Courts of our country stated as under:

The place of residence of a person is the place where he eats, drinks and sleeps. Stoke on-Trent Borough Council vs. Cheshire County Council (1913) 3 KB 599 (706).

Three principles are to be kept in view in determining the residence of a person. The first principle is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the week end is not resident. A short stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the week-end or in hospital, he does not lose his residence on that account. Fox v. Stork (1970) 3 All ER 7.

Residence only connotes that a person eats, drinks and sleeps at that place, and not that he owns it. Residence includes permanent as also temporary residence. Ratan v. State Transport, AIR 1969 MP 204.

Osborn's Concise Law Dictionary, 7th Edition, "residence" with reference to the decision of the Appeal Cases is as under:

The place of a persons's home or habitation; the place where he abides; the place from which the affairs

of a company are directed. It is of importance as determining domicile and liability to taxation. In general, the courts have jurisdiction over persons resident within the territorial limits of the court's powers. A company is resident for tax purposes in the country where its central management and control are exercised. (Unit Construction Co. V. Bullock [1960] A.C. 351)

In Judicial Dictionary, 8th Edition, by K.J. Aiyer with reference to the decisions of different High Courts of the country, the author said residence:

Residence means the place where the man lives and where he has his home. (Globe Theatres Ltd. vs. Khan Sahib Abdul Gani, ILR 1956 Mys 71 : AIR 1956 Mys 57 (FB)).

____ Abode.

Residence, conditions of. (1) It is not necessary that the party must have his own house.

(2) The stay need not be permanent, but can also be temporary, though there must be an intention to stay for an indefinite period.

(3) Casual stay or flying visit with no intention of remaining is not covered by residence.

(4) There must be some intention to remain at a place and not merely to pay it a casual visit.

(5) The intention must be to make the alleged place, an abode or residence either permanent or temporary.

(6) The expression "last resided" also means the place where the person had his last abode or residence, permanent or temporary,

(7) Where there has been residence together of a more permanent character, and a casual or brief residence together, it can only be the former that can be considered as "residence together".

(8) Whether a particular person has chosen to make a particular place of his abode, is to be gathered from particular circumstances of the case. [Cf. Divorce Act, 1859 : S.3(3) ; T.J. Poonam v. Rakhi Varghese, (1966) 1 Ker 485 ; 1966 Ker LT 454 ; 1966 Ker LJ 503 : 1966 Ker LR 311 : AIR 1967 Ker (12)].

Residence within the meaning of Proviso 2 to S.34, Motor Vehicles Act, 1939 may even be temporary. [Rasan Lal vs. S.T.A., M.P., AIR 1969 MP 204 ; 1969 MPLJ 95 : 1969 MPWR 7 : 1969 Jab LJ 635].

The visit of a husband to wife at latter's father's house for consummation of marriage is such as to brand the stay as staying together within meaning of S.19 of Hindu Marriage Act, 1955. [See Lalikamma vs. R. Kannan, AIR 1966 Mys 178].

18. In section 12 of the Act, 1947, the legislature has used the word `premises'. In Section 106, the word is `residence'. The notice under sec. 12(2) of the Act, 1947 which is to be served as per the provisions of sec. 106 of the Act, 1882 is to be delivered to the tenant or any of its member of the family at his residence. The residence cannot be taken to mean the premises i.e. the tenanted premises. The tenant may have residence at a place other than the tenanted premises though those premises would have been taken for residential purpose. The purpose of service of notice under sec. 12 (2) of the Act, 1947 is to give information to the tenant that he is in default of payment of rent so that he may avail of the opportunity to make good all the dues and save himself from the decree of eviction from the premises. I fail to understand how this purpose will not be served in case notice is sent to the tenant at the place other than the tenanted premises. In a case where the tenant is not residing at the tenanted premiss sending of notice to him at the address of the premises will not be of any use and it will return undelivered. It will not be of any use not only to the tenant but to the plaintiff also. This contention of the learned counsel for the appellant is untenable and in case it is accepted then it will frustrate the very purpose and object of giving of notice by the landlord to the tenant under sec. 12 (2) of the Act, 1947. In case the contention of the learned counsel for the appellant is accepted then the word `residence' as used in section 106 of the Act, 1882 has to be read as ` tenanted premises'. That does not appears to be the intention of the legislature nor the reading of subsection 2 of section 12 of the Act contemplates the service of this notice on the tenant only at the premises i.e. the tenanted premises. The intention of the legislature as well as the object and purpose of this provision is to give notice to the tenant by the landlord and how this object and purpose will not be served in case it is served upon the tenant at the place other than

the tenanted premises. Sub-section (2) of section 12 of the Act, 1947 explicitly provides for the procedure for service of notice and that procedure has to be followed and in case the notice is served in accordance with that procedure, it is to be taken to be a valid notice to the tenant.

19. Learned counsel for the defendant-appellant on being asked by the Court is unable to satisfy how any prejudice will be caused to the tenant in case the notice under sub-section (2) of section 12 of the Act, 1947 is not served upon him at the tenanted premises. In case this contention is accepted then it will become very easy for unscrupulous tenant to avoid the service of notice under the aforesaid provision upon him. Otherwise also there are cases where the tenant may even reside at a place other than the place where the tenanted premises are situated or even the same place in different house. For this class of tenants it would have been very convenient to avoid their eviction from the tenanted premises on the ground of non-payment of rent. The tenant will not make the payment of rent and still he will not fall within the clutches of provisions of section 12 of the Act, 1947. The interpretation to the provision and particularly to the words used in statute should have been in the way that it serve the purpose for which it is enacted and not that it makes it nugatory and unworkable. When language used in the statute is unambiguous and on a plain grammatical meaning being given to the words in the statute, the result is neither arbitrary, nor irrational nor contrary to the object of the statute then it is the duty of the court to give effect to the words used in the statute because the words dcclare the intention of the law-making authority. Exactly what it will happen in the present case in case the contention of the learned counsel for the petitioner is accepted. Section 12 of the Act, 1947 will become inoperative for all the time to come for unscrupulous tenant merely on his changing of the residence. The defendant-appellant was residing at the relevant time at Savarkundla and his that address have been given in the plaint as well as in the registered address slip. Notice under sec.12 of the Act, 1947 as well as notice of suit has been served upon the tenant at Savarkundla. When he was not residing at Amreli at the tenanted premises at the relevant time, the landlord has all the right to serve this notice to the tenant-defendant-appellant at his residence under section 106 of the T.P. Act read with section 12 of the Rent Act. Residence means not the tenanted premises but where the tenant is residing and the notice has to be served. The dictionary meaning of

`residence' also states that it is a place where the person is residing. The place of residence does not mean only the tenanted premises. In the present case, notice under sec. 12 (2) of the Act, 1947 has been served in accordance with law and it was a legal notice and both the courts below have not committed any error whatsoever in not accepting this plea of the defendant-appellant. Service of notice on major unmarried daughter at the residence of the defendant-appellant is a valid notice and both the questions framed in this appeal are to be replied in negative.

20. In the result, this appeal fails and the same is dismissed. However, the tenant-appellant is granted six months' time to vacate the premises subject to the conditions that :

(i) he shall furnish an undertaking before this Court within a period of three months from today that he shall hand over the vacant possession of the premises to the landlord-respondent on or before 21st January, 1999.

(ii) he shall make the payment of all the outstanding amount of mesne profit due as on today within a period of three months and shall regularly pay the mesne profit of the premises at the rate at which he was paying during the pendency of these proceedings.

(iii) in case any of the conditions aforesaid is not complied with, the decree as passed by the trial court shall become executable forthwith.

21. As the respondent-plaintiff has not put appearance, no order as to costs.

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